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Supreme Court of the United States

OCTOBER TERM, 1962

No. 1078

CONNECTICUT COMMITTEE AGAINST PAY TV,
STANLEY WARNER MANAGEMENT COMPANY,
LOEW'S, INC.,
CONNECTICUT THEATRES,
MANCHESTER DRIVE-IN THEATRE CORPORATION,
OUTDOOR THEATRES CORPORATION, *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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June, 1962

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Petitioners, an organization representing owners of motion picture theatres and other interested local groups in the Hartford, Connecticut area, and operators of individual motion picture theatres in the Hartford, Connecticut area, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 8, 1962.

OPINION BELOW

The Opinion of the Court of Appeals, printed in the Appendix, hereto, *infra*, p. 1a, has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 8, 1962 (App. 8a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has the statutory authority to authorize a television system under which members of the public are required to pay a fee in order to view the programs presented?

2. If the Commission is empowered to authorize such pay-TV systems, must it first consider and determine whether it has the statutory authority to regulate the rates which will be charged the public, and if it determines that it has such authority, must it consider whether that power should be exercised?

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, as amended, 48 Stat. 1064, *et seq.*, 47 U.S.C. 151, *et seq.*, provides as follows:

> SEC. 2 . . .
>
> (b) Subject to the provision of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with in-

trastate communication service by wire or radio of any carrier, . . .

* * *

SEC. 3 . . .

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

* * *

(o) "Broadcasting" means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

* * *

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or district; or (b)

from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State, or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * *

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each

individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses or frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records

of programs, transmissions of energy, communications, or signal as it may deem desirable;

* * *

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this Act;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation;

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

STATEMENT

This petition seeks review of a judgment affirming a Report, Decision and Order of the Federal Communications Commission which granted, subject to specified conditions, the application of RKO Phonevision Co. (RKO)[1] for authority to conduct a trial operation of pay-TV over the facilities of television station WHCT, Hartford, Connecticut, for a period of three years (30 F.C.C. 301-322).[2] Petitioners were formally named by the Commission as respondents in the proceedings on the RKO application, and participated fully in the proceedings before the Commission (Decision, 30 F.C.C. 301).

An understanding of the issues raised in the instant case requires some consideration of the historical background of radio and television broadcasting operation in the United States. The general listening and viewing public has never been charged for the radio and television programs which it receives.[3] The economic sup-

[1] The application was filed by Hartford Phonevision Co., but during the pendency of the proceeding before the court below, the corporate name of the applicant was changed to RKO Phonevision Co.

[2] The Report, Decision and Order of the Commission which is the subject of these proceedings (hereinafter referred to as Decision), appears in the Joint Appendix in the court below in official slip opinion form. Consequently, references herein to the Commission Report, Decision and Order will utilize the official citation.

[3] The court below referred to the fact that other "subscription" services have in the past been found acceptable by the Commission and the courts. Neither of the systems referred to, however, ever operated in such a manner as to require the payment of a direct fee from the general listening audience. In *Muzak Corporation*, 8 F.C.C. 581, the Commission authorized an experimental operation in FM (frequency modulation) broadcasting similar to that authorized for television in the instant proceeding. That experiment

port for broadcasting comes from advertisers. Advertiser-supported broadcasting was already in existence when, in 1927, the Federal Radio Commission, which represented the first serious effort of the Federal Government to regulate broadcasting, was created. The distinction between American broadcasting and that of some foreign countries in this regard was recognized in the early Congressional debates which led to the enactment of the Radio Act of 1927.[4] The distinction has been extolled very recently by Commissioner Frederick W. Ford of the Commission, who stated in an address delivered on June 28, 1961:[5]

> Unlike the system of broadcasting developed in many countries, the American system of broadcasting has its foundation solidly on the free competitive enterprise system. Commercial advertising is one of the fundamental and necessary ingredients of this system. It is through the millions

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was never conducted, due primarily to the entry by the United States into World War II. Nor was the Commission's authorization of the experimental operation ever tested in the courts. The "functional music" project considered in *Functional Music, Inc.* v. *Federal Communications Commission*, 107 U.S. App. D.C. 34, 274 F. 2d 543, *cert. den.* 361 U.S. 813 did not involve the provision of a service for which the general public had to pay a fee. On the contrary, members of the general public were able to hear the FM transmissions without charge. Only limited subscriber groups paid a fee, and this fee was paid in order that certain of the material which was broadcast would be eliminated from the special receivers maintained by those subscribers. This service was of value to subscribers such as retail stores and restaurants which wished their clientele to hear the muscial portions of the transmitted programs without the advertising commercials and other spoken material.

[4] See 67 Cong. Rec. 5490-91, 12335.

[5] Address by Commissioner Ford before the Advertising Association of the West, FCC release, Mimeo. No. 6968.

> of dollars spent each year in advertising that the hundreds of radio and television stations in the United States have been constructed and maintained as profitable institutions; institutions which serve to amuse, entertain and inform the American people to a far greater extent perhaps than any other country in the world.

As will be discussed more fully, *infra;* although no such system has ever been authorized in the United States, it has been recognized from the beginning of American broadcasting that an alternative system in which the economic support would come from direct payments by the listening or viewing public might be technically feasible. In addition to the *Muzak* proposal referred to in footnote 3, *supra,* the Commission has, in fact, authorized experimental operation of at least three different systems of pay-TV for the purpose of ascertaining whether they are technically feasible.[6] None of these experiments permitted the charge of a fee to any member of the public; they were designed exclusively to determine whether the encoding and decoding devices which would be utilized would work, and whether their use would involve any serious degradation of the transmitted signal. It was not until 1955 that the Commission took any formal action looking toward the authorization of even a trial pay-TV operation which would involve charging fees to members of the general viewing public.

At that time the Commission, in response to petitions by a number of pay-TV proponents who sought permanent authorization for their systems, instituted a

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[6] See *First Report on Subscription Television,* 16 Pike and Fischer, R. R. 1509, 1513.

Notice of Proposed Rule Making[7] which solicited comments on a number of questions, including whether the Commission had power to authorize pay-TV operations, and if such power existed, whether such operations would serve the public interest.

In 1957, the Commission, after considering the comments which had been filed, issued its First Report on pay-TV[8] in which the Commission concluded that the Communications Act of 1934, as amended, provided the statutory authority for it to authorize pay-TV operations, and set forth the conditions under which the Commission would consider applications for a "trial" of pay-TV in which members of the general public would be charged directly for the programs which they viewed. The First Report would have allowed trial operation of any pay-TV system[9] in any of the twenty major markets in the United States which currently receive at least four television services. No one system, however, would have been permitted to operate in more than three markets. 16 Pike and Fischer, R.R. at 1524.

The issuance of the First Report stirred critical comment. The House Committee on Interstate and Foreign Commerce held hearings on the Report and eventually adopted a Resolution stating that until the Communications Act was specifically amended

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[7] *Matter of Subscription Television Service*, FCC 55-165 (Docket No. 11279, Feb. 10, 1955).

[8] *First Report on Subscription Television*, 16 Pike and Fischer, R. R. 1509 (hereinafter referred to as "First Report").

[9] The First Report referred to five different systems of pay-TV which had been called to the Commission's attention, three of which had already been field tested to determine their technical capacities. 16 Pike and Fischer, R. R. at 1513.

to grant the Commission power to authorize pay television operations, no such action should be undertaken. The basis of Congressional apprehension was that such trial operations and the consequent investment of large sums of money in pay-TV systems by their promoters and by the public would virtually establish pay-TV as a *fait accompli* without specific Congressional approval.[10] In response to these fears the Commission issued its Second Report on pay-TV operations, which withheld the processing of applications filed under the First Report until the expiration of the 85th Congress.[11] This policy was voluntarily continued by the Commission until the end of the 86th Congress.

Upon the expiration of the 86th Congress, the Commission reevaluated the controversy and issued its Third Report.[12] The Third Report readopted and reaffirmed virtually all of the conditions for trial operation which had been set forth in the First Report. However, for present purposes, the most significant change was that the trials were to be limited to one system in each market and to only one market for each

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[10] See Remarks of Congressman Oren Harris, Chairman of the House Interstate and Foreign Commerce Committee, 105 Cong. Rec. 4812. In addition, numerous bills have been introduced in Congress which would have prohibited the Commission from authorizing pay television operations. See, *e.g.*, H.R. 586, 85th Cong. 1st Sess. (1957); H.R. 166, 86th Cong. 1st Sess. (1959); H.R. 68, 86th Cong. 1st Sess. (1959); H.R. 3020, 86th Cong. 1st Sess. (1961); S. 2268, 85th Cong. 1st Sess. (1957); S. 591, 86th Cong. 1st Sess. (1959).

[11] *Second Report on Subscription Television*, 16 Pike and Fischer, R. R. 1539.

[12] *Third Report on Subscription Television*, 16 Pike and Fischer, R. R. 1540a (hereinafter referred to as "Third Report").

system. 16 Pike and Fischer, R.R., at 1540b. The Commission stated that when "sufficient and meaningful data" became available it would hold public hearings to decide whether pay-TV should be permanently authorized. 16 Pike and Fischer, R.R., at 1533. The House Committee, by a vote of 11 to 10, then adopted a Resolution which stated, in effect, that it had no objection to a "trial" operation under the new limitations of the Third Report. There was nothing in that Resolution which indicated any change in the Committee's views on the basic power of the Commission to authorize regular pay-TV operations. 105 Cong. Rec. 4812-4813.

After the Commission issued its Third Report, RKO purchased the assets of television station WHCT in Hartford, Connecticut, and applied for authority to utilize that station for a pay television trial under the terms of the Third Report. The RKO system will operate as follows:

RKO, as the *actual broadcast* licensee of WHCT, will use the Zenith Radio Corporation "Phonevision" system.[13] It proposes to broadcast a scrambled signal—for some 40 of its 70 broadcast hours during

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[13] RKO Phonevision Company is a wholly owned subsidiary of RKO General, Inc. The latter, in turn, is the franchise holder of Zenith's Phonevision System for the Hartford area. Zenith is the holder of the patents covering the pay television system equipment and will directly supply the decoders. (Decision, 30 F.C.C. 306.) An entity known as Teco, Inc. has been granted licenses by Zenith to distribute Zenith's encoding equipment to RKO, and will also aid in the procurement of programming for the Hartford operation. The Commission found that "substantial identity of ownership and interest in Zenith and Teco" exists (*ibid.*).

prime television time[14]—over the frequency assigned to WHCT which signal cannot be received by the ordinary television receiver. In order to render the scrambled signal intelligible, a subscriber must attach a decoding unit to his set and must tune the decoder to a code number which corresponds to the code number of the transmitted signal.

In order to avail himself of this pay-TV service, a subscriber must pay three separate and distinct charges. He must bear the cost of installation of the decoders, which was estimated by RKO to be between $7.50 and $10.00. In addition, he will be charged a weekly rental fee of up to $.75 and, of course, he will have to pay for each program separately. This latter charge will vary from between $.25 to $3.50. RKO expects that the majority of programs will fall within a price range of $.75 to $1.50. It contemplates a maximum of 50,000 subscribers. See Decision, 30 F.C.C. 304, 305.

RKO promised that its programming fare would consist primarily of first run movies which may be supplemented by such "box office" attractions as legitimate threatre, opera, ballet and concert performances (Decision, 30 F.C.C. 307-08). A "box office" attraction is one which, in the opinion of RKO, would command the payment of a fee from the public if produced outside of television and/or is not now available to free television viewers. RKO admitted, however, and the Commission's Decision recognized (*Id.* at 308), that RKO would offer programs which met its definition of "box office" attraction even though such pro-

[14] These hours are 7:30 through 11:00 p.m. every day, 5:30 through 6:30 p.m. Monday through Friday, 2:00 p.m. through 6:30 p.m. Saturdays, and 2:00 p.m. through 5:30 p.m. Sundays.

grams became avaliable to it at prices which would render them feasible for sponsorship by commercial advertisers over free television (J.A. 163-165).

In the Decision, which is the subject of the instant proceeding, the Commission, after holding an evidentiary hearing, concluded that the RKO application met the conditions of the Commission's Third Report, and granted the requested authorization (Decision, 30 F.C.C. 301-32[illegible]. Neither in the Decision, nor in the prior First and Third Reports, did the Commission consider whether it could or should regulate the rates to be charged the public. Its sole expression with respect to rates was to require that charges, terms and conditions of service be applied uniformly. Decision, 30 F.C.C. at 310-311, 322; First Report, 16 Pike and Fischer, R.R. at 1529-30.

The court below held that the Commission (1) possesses the power under the Communications Act to authorize a trial or experimental pay-TV operation, (2) had properly determined to authorize this proposed experiment despite the fact that it had no precise knowledge of the programming which would be presented, and (3) had not erred in concluding that the proposed programming plans would nevertheless serve the public interest. The latter two questions are not put forth as grounds for the granting of certiorari by this Court.

With respect to the question of the Commission's power, the court below held (App. 5a-6a):

> The Federal Communications Commission was established in 1934 under a typically broad grant of power by which the Commission was authorized by Congress, subject to limitations not pertinent here, to issue a broadcasting station license to any

applicant "if public convenience, interest and necessity will be served thereby." 47 U.S.C. Sec. 307(a). Additionally, Congress specifically commanded the Commission by Sec. 303(g) of the Communications Act, to "study *new uses* for radio, *provide for experimental uses of frequencies*, and generally encourage the larger and more effective use of radio in the public interest." (Emphasis added.) The plain language of the statute thus makes clear that Congress placed an affirmative duty on the Commission to experiment with and develop the most desirable deployment and utilization of the nation's communications facilities. The Supreme Court has said that "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the final expression of the meaning intended." *United States* v. *Missouri Pac. R.R.*, 278 U.S. 269, 278 (1929).

The court below further held that the fact that the authorization was for three years duration, the normal life of a conventional broadcast license, did not alter the essentially experimental nature of the grant. It pointed out that if difficulties were to arise during the trial operation which might result in harm to the public interest, the Commission could terminate the experiment upon notice and hearing and that the Commission could decline to renew the authorization at the expiration of its three-year term (App. 6a-7a).

REASONS FOR GRANTING THE WRIT

1. A system which requires the direct payment of fees by the public, in order to receive programs broadcast on publicly controlled broadcast facilities, represents a major and a drastic change in the nature of American broadcasting. Until now, broadcasting has

been supported solely by commercial advertisers. There was, and is, no direct, financial relationship between a listener and a broadcast licensee. The absence of this relationship is more than just a matter of commercial choice; it represents an important feature distinguishing broadcasting from public utilities and common carriers—a distinction which was explicitly recognized by Congress when it drafted and adopted the Communications Act and its predecessor statutes.[15]

The decision below is, therefore, of far reaching significance, and may result in a basic change in activities which consume a very substantial portion of the time and attention of the people of the United States. The dangers inherent in a pay-TV operation, however, are more serious than the mere establishment of a new system to be operated under a different theory of broadcasting. If allowed to flourish, it raises the spectre of permanent loss of programs and program talent to the free viewing audience and, in addition, may siphon viewers from the programs that remain on free television and thereby threaten the commercial support which free television needs.[16] Moreover, the establishment of a pay-TV system raises the problem of control of broadcast material by the owners of the patents covering that system in much the same way as

[15] See, *e.g.*, the remarks of Senator Broussard who, during the debates on the Radio Act of 1927, stated "radio makes no direct charges whereas the others (telephone and telegraph) are in the business of serving the public for direct pay." 67 Cong. Rec. 12504. See *Pulitzer Publishing Co.* v. *Federal Communications Commission*, 68 U.S. App. D.C. 124, 126, 94 F. 2d 249, 251.

[16] The Commission itself is aware of this possibility. See Decision, 30 F.C.C. 314; First Report, 16 Pike and Fischer, R.R. at 1521.

the owners of original radio broadcast patents threatened to establish absolute control in the early days of radio.[17] The Commission itself is aware of this danger.[18]

The Commission in the First Report[19] concluded that the Communications Act empowered it to authorize pay-TV operations on a permanent basis. Although it admitted that the Act contains no specific or direct delegation of power which authorizes such a drastic change in the concept of American broadcasting, it found the requisite power in the general provisions of the Act, particularly Section 301, 303(b), 303(e), and 303(g). It found further support for its conclusion in the legislative history of the Radio Act of 1927, 37 Stat. 302, *et seq.* It concluded that, "We have stated that in our opinion the Commission has the power to authorize subscription television operations. For the reasons discussed below, we make the further finding that it would be in the public interest to exercise this power to the extent of the action we are taking herein concerning trial operations." See First Report, 16 Pike and Fischer, R.R. at 1520.

The statutory provisions relied upon by the Commission do not support the Commission's interpretation of its power. Section 301 of the Act merely states

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[17] See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137.

[18] See First Report, 16 Pike and Fischer, R. R. at 1524.

[19] The only determination by the Commission with respect to its basic statutory power concerning pay-TV is contained in the First Report. The Decision which is the subject of the instant proceeding is concerned essentially with whether the RKO application meets the conditions set forth in the Commission's First and Third Reports.

the general purposes which the Act was drafted to effectuate. This broad statement does not grant the Commission any power. It nowhere suggests or even hints that the use of the public channels can be licensed to those who would withhold the benefits of those channels from persons who fail to pay a per program fee.

The general powers of the Commission are stated in Section 303. Thus, Section 303(b) gives the Commission power to prescribe the nature of the service to be rendered by each station. Section 303(c) allows the Commission to assign frequencies to various classes of stations and to designate the power and the time which they may operate. Section 303(d) allows the Commission to determine the location of the different stations. Section 303(e) allows regulation of the apparatus to be used. Section 303(f) grants the Commission power to make such regulations as are necessary to prevent electrical interference between stations and to carry out the provisions of the Act. The balance of Section 303, with the exception of subsection (g), covers miscellaneous rules to insure the proper technical operation of all stations.

The only part of Section 303 which gives any support whatever to the interpretation adopted by the Commission is Section 303(g), which empowers the Commission to study new uses for radio and to provide for experimental uses for frequencies, and generally to encourage the larger and more effective use of radio in the public interest. Unquestionably, this section grants the Commission the power to permit the conduct of technical tests such as those referred to above to determine whether the equipment can perform satisfactorily. Indeed, the Commission has specifically set forth in its Rules provisions for "experi-

mental" television stations, as well as for experimental and developmental radio stations (see 47 CFR 4.101-4.351).[20] However the power to utilize frequencies for technical experiments does not justify the use of a frequency on a trial basis in which the licensee, for a period of 3 years, will attempt to persuade 50,000 home-owners to rent its equipment and pay for its programs at a cost of approximately $15,500,000.[21]

Neither does the legislative history of the Radio Act of 1927 support the Commission's interpretation of its power. If anything, that history establishes that although the notion already existed that radio programs might be presented to the public on the basis of the payment of a direct fee from the public to the broadcaster, advertiser supported broadcasting had become so firmly established that the Congress did not consider subscription broadcasting as a meaningful possibility. See, *e.g.*, 67 Cong. Rec. 12335, 68 Cong. Rec. 2580, 2880-2881, 3033.

In essence, the Commission's position comes down to this: Congress gave its broad powers to regulate communications, specifically instructed it to study new uses for radio, and did not specifically deny it the power to license pay-TV operations. Thus, argues the Commission, it has the power to grant authorizations of a unique and revolutionary character which were never

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[20] The Commission's Rules provide that "experimental" television broadcast stations may not charge, either directly or indirectly for their programs. Identical provisions are found in the case of developmental broadcast stations. (See 47 CFR 4.382.) These Rules prohibit any commercial operation, *i.e.*, they prohibit charges for advertising.

[21] This is RKO's own estimate of its programming and decoder revenue. J. App. 122.

contemplated by the drafters of the Act and which differ from any problems with which it has ever before dealt. It does so despite the fact that the organic act under which it was created sets out no guideposts or standards with which to protect the public.[22]

This Court's mandate in *Interstate Commerce Commission* v. *United States ex rel. Los Angeles,* 280 U.S. 52 seems particularly appropriate in this situation. There, in a situation in which a regulatory agency attempted to infer from the grant of broad, not clearly applicable, powers, the power to order an action which might result in large-scale dislocation to railroad lines throughout the country, which might have an effect on every city in the United States, and require the establishment of new tribunals to apportion various expenditures and costs which would thereby accrue, this Court stated that "* * * a proper statute would seem to require detailed directions and we should expect the intention to be manifested in plain terms and not to be left to be implied from varied regulatory provisions of uncertain scope" (280 U.S. at 69). See also *Blau* v. *Lehman,* 82 S. Ct. 451, 455 (1962); *Border Pipeline Co.* v. *Federal Power Commission,* 84 U.S. App. D.C. 142, 145, 171 F. 2d 149, 152.

The court below never reached the basic question of the Commission's power. It did not address itself to the Commission's determination that it possesses the power to authorize pay-TV on a regular, perma-

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[22] A serious question is raised as to whether the Commission has the statutory power to authorize pay-TV systems, if Congress has deprived it of the concomitant power to regulate the rates which will be charged the public. See discussion *infra,* pp. 23-25.

nent basis.[23] It held, merely, that the Commission's power to provide for experimental uses of frequencies constituted a sufficient basis for the authorization here in issue. Its opinion is explained and justified exclusively by the experimental nature of the authorization.

It is respectfully urged that this opinion is erroneous because, as has been shown, the Communications Act does not provide a basis for this authorization. But more significantly, the court below did not test the validity of the Commission's action on the basis posited by the Commission itself. The issue of the Commission's power to authorize true experiments was not presented in the instant case, because the Commission did not base this action on that power. The Commission's determination to proceed with this "trial" is grounded squarely upon its determination that it possesses the power to authorize pay-TV operations on a permanent basis. If the Commission had concluded that it did not possess the power to authorize permanent pay-TV operations, it is doubtful whether it would have proceeded with this "trial." In such circumstances, if it deemed pay-TV to be in the public interest, it might reasonably have sought from Congress the necessary permanent authorization before proceeding with any "trial" operations.

That fact that this "trial" will have a grave impact on the public cannot be questioned. The pay-TV proponents anticipate that the Hartford public will spend more than $15,000,000 in three years. Moreover, the Commission's First and Third Reports con-

[23] The court below correctly stated Petitioners' contention in this regard, that "* * * the Commission lacks statutory power to authorize a television broadcast system which requires the direct payment of fees from the public * * *." (App. 5a.)

template additional "trials" of other systems, and, in fact, an application has been filed with the Commission seeking authorization for the trial of another system in Denver, Colorado.[24] Under the Third Report there may be as many trials as there are systems, and each would take place in a major community of the United States. The problems raised thereby are of the greatest significance, and the trials themselves may result in a grave impact, both financial and otherwise, on very substantial portions of the public.

The Commission's Decision did not rule on the specific issue of whether the Commission had the power to authorize the instant operation, as an experiment, if it did not have the power to authorize it on a permanent basis. Had the Commission's Decision been grounded on that power, the decision of the court below would have been meaningful, though incorrect. Since the authorization to RKO was based on the asserted power of the Commission to authorize pay-TV on a regular basis, and since the proposed "trial" may itself have the most serious, permanent impact on the public, the decision of the court below failed to decide the issue which was presented, and will, if allowed to stand, permit a far reaching and important change in American broadcasting and the powers of the Commission without any adequate judicial review.

2. The court below also ignored a serious question which flows inevitably from the decision which it reached. Does the Commission have the power to regu-

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[24] Application of Gotham Broadcasting Corporation for authorization to conduct subscription television operations over Station KTVR, Channel 2, Denver, Colorado, listed as accepted for filing by the Commission on May 10, 1962, F.C.C. Report No. 6774, Mimeo. No. 20019.

late the rates which may be charged the public under pay-TV operations, and, if such power does exist, should it be exercised by the Commission either with respect to the trial operation here authorized or with respect to any permanent pay-TV operation? Of course, if it were determined that the Commission lacks the statutory authority to permit pay-TV operations, this question would not arise. On the other hand, if the court below was correct, the question of the Commission's regulatory responsibilities in this area is one of grave significance both to the affected public and to the future exercise of regulatory responsibilities by this Commission and by other Federal regulatory agencies.

In neither the First or Third Reports or the Decision here under review did the Commission discuss whether it has been empowered to regulate the rates which may be charged the public, or whether, if it possesses such power, it must or should be exercised with respect to pay-TV. In the First Report, the Commission did expressly consider whether pay-TV is "broadcasting" or "common carriage", as defined in Sections 3(o) and 3(h) of the Communications Act. It concluded that it was both unnecessary and undesirable to determine at this stage the proper classification of pay-TV under the Communications Act. 16 Pike and Fischer, R.R. at 1519-1520. Had the Commission determined that pay-TV is "broadcasting" it might have been contended that the Commission is without power to regulate the rates which might be charged the public. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470. By failing so to classify pay-TV, the Commission in effect left open the question of its existing power to

regulate rates. Indeed, the Government expressly urged in the court below that one of the remaining problems which the Commission would have to decide is whether it should regulate rates, and, if so, in what manner. The Government also stated that if it were determined that rates should be regulated, the type and degree of regulation might or might not require additional legislation.[25]

In the hearing conducted on the RKO application the Commission did not elicit any of the information which normally would be required to determine the reasonableness of rates to be charged. The record before the Commission does not contain any cost breakdown of RKO's estimates of cost, no analysis of RKO's estimated revenues, and the decision contains no discussion of what a "reasonable" rate might be or the traditional methods by which the reasonableness of charges in other fields are determined. In fact, the Commission stated that "* * * the question of reasonableness is not within the issues as framed."[26] Decision, 30 F.C.C. at 311.

Petitioners respectfully urge that no valid authorization for pay-TV operations could be made absent a determination by the Commission whether it can or should regulate the rates to be charged. The principal purpose of the trial operation is to determine the eco-

[25] See brief of Appellee-Respondent below, p. 23.

[26] The authorization granted to RKO is conditioned upon the applicant's maintaining a complete record of all aspects of the trial operation, including, presumably, those materials which might conceivably serve as the basis for rate regulation at some future time. However, in light of the Commission's express statement that the issues do not concern the question of rate regulation, it is apparent that the Commission has not considered either whether it has the power to regulate rates or should exercise that power.

nomic feasibility of pay-TV, since its technical feasibility has already been established. It is the essence of arbitrary Commission action to authorize a radical departure from the established system without even giving thought to the question whether the Commission has or should exercise regulatory power over the single aspect of the new system which serves to differentiate it in such a marked way from the system which has been in effect for almost 40 years.

Nowhere in the instant decision, or in the prior First and Third Reports, did the Commission suggest that one of the purposes of the "trial" operation is to determine whether rates should be regulated. The First and Third Reports and the instant decision are devoid of any indication that the Commission gave any thought whatsoever to this question. Neither did the court below consider this aspect of the implications of its basic determination which affirmed the Commission's power to authorize pay-TV operations on a trial basis.[27]

All of the questions of the Commission's basic power to authorize pay-TV operations and the propriety of its exercise are intimately connected with the questions of the Commission's power of rate regulation and the propriety of the exercise of that power. It is respectfully submitted that to allow the institution of this radical new service without any determination either by the licensing authority or a reviewing court of the essential question of rate regulation is clearly erroneous.

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[27] The entire matter of the Commission's regulatory power over rates was presented to the court below in the Briefs of Petitioners and the Government. See Petitioners Brief, pp. 20-21, 22-23, Government's Brief, p. 23, Petitioners Reply Brief, pp. 4-6.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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